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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

**PENBERTHY ELECTROMELT
INTERNATIONAL, INC.,**

Appellant,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,**

Respondent.

PCHB No. 93-27

**ORDER GRANTING
SUMMARY JUDGMENT**

The Department of Ecology ("Ecology") filed a motion for summary judgment on all the issues in this case, on October 26, 1993. Subsequently, this matter was consolidated with PCHB No. 93-256, in which the appellant, Penberthy Electromelt International, Inc. ("PEI"), challenged an Ecology order requiring PEI to submit an adequate closure cost estimate and financial assurance mechanism for the January 31, 1993 closure plan. That closure plan, which was approved by Ecology, is what is at issue in this case.

The Pollution Control Hearings Board ("Board") is comprised of Robert V. Jensen, presiding, and James A. Tupper, member. The third member of the Board, Richard C. Kelley, did not participate in the case, having recused himself.

PEI was represented by its President, H. Larry Penberthy. Ecology was represented by Kathy Gerla and Thomas Morrill, Assistant Attorneys General.

The Board considered the record in these cases, and particular, the following pleadings which were filed in conjunction with the motion:

- 1) Department of Ecology's Motion for Summary Judgment;
- 2) Department of Ecology's memorandum of Points and Authorities in Support of Motion for Summary Judgment;
- 3) Declaration of Julia A. Sellick;

**ORDER GRANTING
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- 1 4) Order Denying Motions, H. Larry Penberthy v. United States Environmental
2 Protection Agency (9th Cir. September 7, 1993);
3 5) Memorandum, H. Larry Penberthy v. United States Environmental Protection
4 Agency (9th Cir. September 7, 1993);
5 6) Declaration of Kathryn L. Gerla;
6 7) Penberthy's Response in Opposition to Ecology's Motion for Summary
7 Judgment;
8 8) Declaration of H. Larry Penberthy; and
9 9) Department of Ecology's Reply to PEI's Response to Ecology's Motion for
10 Summary Judgment.

11 Having considered the argument, we rule as follows:

12 I

13 The Environmental Protection Agency ("EPA"), on October 23, 1991, notified PEI
14 that PEI's interim status for its thermal treatment unit ("furnace") was terminated, effective on
15 the date of receipt the letter. EPA further advised PEI that it could no longer treat hazardous
16 wastes in its furnace.

17 II

18 EPA also wrote PEI that it could appeal EPA's decision, within ninety days, to the
19 Circuit Court of Appeals of the United States. Finally, EPA commanded PEI to submit a
20 closure plan for the furnace which complied with WAC 173-303-610, within fifteen days from
21 receipt of the letter.

22 III

23 PEI filed an appeal in the Ninth Circuit of the Court of Appeals. It also, within the
24 fifteen days, wrote Ecology, stating that it had stopped processing waste as of June 6, 1991,
25 and carried out its own plan of closure. It informed Ecology that it considered this to be the
26 closure plan called for by EPA.

27 IV

Closure plans are required of all dangerous waste facilities. WAC 173-303-610(3).
The purpose of these plans, which must be submitted with an application, is to "protect public

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2 welfare and health in case the plant is no longer operating and needs to be closed" Final
3 Revised Findings of Fact, Revised Conclusions of Law and Order Upon Reconsideration at 15,
4 Penberthy Electromelt International v. Department of Ecology, PCHB No. 90-136 (December
5 27, 1990).

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V

PEI submitted a closure plan to Ecology on March 29, 1990. Id. at 9. The Board found this plan to be deficient in several respects. Id. at 16. Ecology, on October 11, 1990, received from PEI a revised cost closure plan. Ecology concluded that it did not address the deficiencies noted in the earlier plan. Ecology requested PEI to revise the plan, but did not receive any further submittals, other than the letter from PEI that it had closed its facility.

VI

Ecology modified the October closure plan and approved it on January 1, 1993. This plan was sent to PEI with a cover letter. The cover letter stated that, under state and federal law, final closure, in accordance with the approved closure plan, must be accomplished within 180 days after approval of the closure plan. WAC 173-303-400(3)(a); 40 CFR 265.113(b).

VII

The letter also stated that PEI was required to submit a detailed and adequate cost estimate for the closure of the furnace, and a financial assurance for closure, within 30 days of receipt of the approved closure plan.

VIII

PEI appealed Ecology's action to this Board on February 4, 1993. The Presiding Officer held a pre-hearing conference on March 31, 1993. The Pre-Hearing Order specified the issues for the hearing. These were based on the issues raised by PEI in its appeal, and those raised in the pre-hearing conference. In summary, these were: 1) whether Ecology's

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2 closure plan, the requirement that PEI close in 180 days, the requirement to submit within 30
3 days a detailed and adequate cost closure estimate and a financial assurance mechanism, to be
4 chosen by PEI from the options contained in 40 CFR 265.143(a)-(e), violate the following
5 statutes: RCW 70.105.005(3), (7)(c); 130(2)(b); 215; and 42.17.251; 2) whether Ecology's
6 January 1, 1993 letter is an appealable order; and 3) whether the Board has jurisdiction to
7 determine the validity of Ecology's regulations, as applied, in this case?

8 IX

9 The issues stated in the Pre-Hearing Order govern the subsequent proceedings, unless
10 the order is modified by subsequent order, based on a showing of good cause. WAC 371-08-
11 140(2). PEI was given time to identify the regulations it intended to challenge in this case.
12 However, despite an extension of the deadline, PEI has never supplied this identification.
Accordingly, the third issue is moot.

14 X

15 The second issue is also moot, because, since the Pre-Hearing Order, Ecology issued
16 an enforcement order commanding PEI to submit the cost closure estimate and financial
17 assurance mechanism, within 30 days. That order was appealed, and the case consolidated
18 with this one. Thus the issues surrounding the substance of the January 1 letter, as they are
19 related to the cost estimate and the financial assurance mechanism, are subject to review in the
20 subsequent case.

21 XI

22 Ecology has satisfied its burden of showing that there are no genuine issues of material
23 fact. The fact asserted by PEI that it has completed closure, is not relevant to this litigation.
24 What is relevant is whether the cost closure plan complies with the above-named statutes. The
25 Board has previously concluded, in its Order Granting Stay, that PEI has failed to make a
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2 showing that the closure order violates any of the above statutes. He has failed to point the
3 Board to any authority in this motion which leads to a contrary conclusion.

4 XII

5 Based on the above analysis, the Board enters this:

6 ORDER

7 Summary judgment is granted to Ecology, and PCHB No. 93-27 is dismissed.

8 DONE this 14th day of April, 1994.

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10 POLLUTION CONTROL HEARINGS BOARD

11 
12 ROBERT V. JENSEN, Presiding Officer


JAMES A. TUPPER, JR., Member

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ORDER GRANTING
SUMMARY JUDGMENT
PCHB NO 93-27